

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,419

UNITED STATES OF AMERICA, Appellee

-VS-

REUBEN M. WAUGH, JR., Appellant

On Appeal From
the United States District Court
of the District of Columbia

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

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BRIEF FOR APPELLANT

ISSUE PRESENTED

Whether the search of and the seizure of articles of clothing from the defendant's automobile violates the Fourth Amendment to the Constitution of the United States.

This case has never previously been before this Court under the same or a similar title.

REFERENCES TO RULINGS

None.

STATEMENT OF THE CASE

On March 14, 1969, following a trial before a jury, the appellant herein was found guilty of Burglary II and Grand Larceny. On April 19, 1969, the appellant was sentenced to concurrent sentences of two to eight years for each of the offenses. Execution of the sentence was suspended and the appellant placed on probation for five years.

It is from the findings of guilty and the sentence that this appeal is taken.

On April 28, 1969, the Appellant petitioned for leave to appeal in forma pauperis, which petition was granted on August 13, 1969.

STATEMENT OF THE FACTS

On April 5, 1968, at about 7:00 P.M., a group of between 20 to 36 police officers "responded" to the area of Tenth and D Streets, Northwest, in the District of Columbia (1 Tr. 10-11, 56).^{/1} They arrived at about

^{/1} Counsel for appellant originally received a transcript of proceedings which included only the first two and a half days of the trial, less the voir dire and the opening statements. The pages of this transcript are numbered 1-178. Upon request, a supplementary transcript containing opening statements by counsel was received. The pages of this supplementary transcript are numbered 3-14. Upon

(cont'd.)

the intersection of Tenth and D Streets, Northwest in a bus which came down Tenth Street in a southerly direction (1 Tr. 11). The bus stopped, and all of the policemen left the bus (1 Tr. 11, 56-57). At least some of the policemen noticed two automobiles, a Ford and a Oldsmobile, on Tenth Street (1 Tr. 11-12, 57). The Oldsmobile, owned by appellant (1 Tr. 67) was occupied by three persons, the appellant, who was in the driver's seat, and two females (1 Tr. 13, 57). Some person, or persons were observed fleeing from the vicinity of the two parked automobiles (1 Tr. 29, 34, 66). There was a curfew in effect in the District of Columbia, requiring all citizens to be "off the street" of the District of Columbia by 5:00 P.M. (1 Tr. 60-61). Several of the policemen approached the appellant's car and, apparently as a result of the curfew violation, placed the appellant under arrest (1 Tr. 61). The arrest was made immediately as the policemen arrived at appellant's

/1 (Cont'd.) further requests, the balance of the transcript, prepared by a Court reporter other than the reporter who prepared the first two and a half days of trial, was received. The pages of this second supplemental transcript are numbered 1-117. For reference purposes, the first transcript will be referred to as 1 Tr; the first supplemental transcript will be referred to as 2 Tr; and the second supplemental transcript will be referred to as 3 Tr.

car and the appellant had to be physically assisted in getting out of his car (3 Tr. 8-9, 13). After appellant was placed under arrest and as he was getting out of his car, at least two of the policemen noticed some articles of clothing in the rear seat of appellant's car (1 Tr. 16-17, 59).^{/2} Upon being arrested the appellant was placed in the bus (3 Tr. 9, 14) and the appellant's car driven to the police headquarters basement at which time the items in back of the appellant's car were inspected and an inventory made (1 Tr. 30, 59).^{/3} Following a search of the pockets and inner linings of the clothing found on the back seat, the police determined that the articles may not properly have been in the appellant's possession (1 Tr. 21-26).

All additional facts necessary for the disposition of this appeal are set forth in the brief, infra.

^{/2} One of the two policemen who testified stated that the articles in the rear seat of appellant's car were visible, "...but you would have to walk to the car to look at it to see it." (1 Tr. 17) The other policeman testified that until he approached the car, he did not even see the passengers (1 Tr. 63).

^{/3} A recital of the items found in the rear seat of appellant's car (1 Tr. 17; 3 Tr. 10, 21-23), reveals that none of the items were contraband per se, i.e., firearms, drugs, etc., or without initial inspection, could be considered as per se as articles which the appellant could not reasonably own and possess.

ARGUMENT

THE SEARCH OF APPELLANT'S AUTOMOBILE WITHOUT A WARRANT VIOLATED THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IT WAS ERROR TO ADMIT EVIDENCE SEIZED AS A RESULT OF THAT SEARCH.^{/4}

The initial search of appellant's automobile was made at the police garage after the appellant was in custody and in the police station.^{/5} The record is silent as to whether the police had a search warrant, if one was ever issued, at the time they conducted the

^{/4} This issue was not raised at trial. However, because it does allege an error of constitutional dimensions and would be cognizable under 28 U.S.C. §2255, either by itself or in conjunction with a claim of ineffective assistance of counsel for failure to raise the issue, this Court may take notice of the issue, see No. 22,743, United States v. Weaver USCA, D.C., Jan 22, 1970 F. 2d. Further, the appellant urges that Chimel v. California, 395 U.S. 752 (1969), to the extent that it is applicable to the instant case, should be given retroactive application. In this regard, United States v. Hart, 407 F. 2d 1089 (1969, 2nd Cir.) would permit this Court to consider this issue for the first time on appeal although not raised at the trial.

^{/5} The testimony of the arresting officers is unclear, although it does appear that aside from mere viewing of the items in the back seat of the car, at the time of arrest, all of which items could have been the property of the appellant, and the mere presence of which would not give cause to suspect him of larceny, the first actual inspection and inventory of the property in the rear of the car was made at the police impounding lot. (1 Tr. 59)

search. Under well established law, the warrantless search of an automobile long after the arrest of the accused, and at a time when there is no danger of injury to the arresting officers, escape, destruction of evidence or the movement of the evidence, is "unreasonable" within the context of the Fourth Amendment to the Constitution,^{/6} and evidence obtained as a result of such searches is inadmissible. Go-Bart Importing Company v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452 (1932); Preston v. United States, 376 U.S. 364 (1964); Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 39 (1968); Chimel v. California, 395 U.S. 752 (1969).^{/7}

Assuming arguendo, that the initial inspection at the time of the arrest can be construed to be a

^{/6} The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Constitution, Amendment IV

^{/7} See also Leven v. United States, D.C. App. No. 4886, Jan. 15, 1970, reported in Volume 98 - Number 19 of the Daily Washington Law Reporter, p.149, Jan. 28, 1970, for a case which arose at a time and under circumstances similar to the case sub judice, and Bowling v. United States, 122 U.S. App. D.C. 25, 350 F. 2d 1002 (1965) where the Court reversed a conviction on the grounds that, inter alia, that a
(Cont'd.)

search, the facts and circumstances surrounding such a search would have to be analyzed to determine whether or not it was "reasonable" within the meaning of the Fourth Amendment. Preston v. United States, supra. Between 20 and 36 policemen got off the bus when it arrived at the intersection of Tenth and D Streets, N. W., and surrounded the appellant's car (3 Tr. 14). The police were armed with weapons, including shotguns (3 Tr. 7). After the police assisted in removing the appellant from his automobile, there was no reasonable apprehension by the police that the appellant could have obtained a weapon from a pile of clothing on the rear seat of the automobile. Terry v. Ohio; Sibron v. New York, both supra, and hence a search of the clothing at that time merely to determine their status would not be justified. Nor did the police reasonably fear that the automobile would be immediately moved away by the appellant, Carroll v. United States, 267 U.S. 132 (1925). And, there was no suspicious behavior on the part of the appellant other than the apparent curfew violation, which would justify a search, compare Peters v. New York, 392 U.S. 39 (1938).

/7 (Cont'd.) renewed search at a distance of some miles from the situs of the original arrest was not incident to a lawful arrest, and hence, evidence seized at such a search, without a warrant, was inadmissible.

Analyzing all of the facts and circumstances, the search of the appellant's automobile without a search warrant was unreasonable, whether it was made at the time of arrest, Chimel v. California; Sibron v. New York, both supra, or after the automobile was impounded and in the custody of the police department, Preston v. United States, supra.^{/8}

The admission into evidence of Government Exhibits 1 through 5(c), inclusive, which evidence was seized without a search warrant was error. The appellant's conviction and sentence having been secured on the basis of the illegally obtained evidence, are in violation of the Constitution of the United States, and should, therefore, be set aside and the charges ordered dismissed.

CONCLUSION

For the reasons stated, the appellant's conviction should be reversed and the sentence should be

^{/8} It should be noted that the situs of the arrest is approximately six to eight city blocks from the Courts. If the arresting officers determined that a search was necessary at the time of arrest, a warrant could have been procured in a relatively short period of time.

vacated. In the alternative, the case should be re-
manded to the District Court for a full hearing on the
reasonableness of the search.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert M. Price, certify that (2) two copies of the foregoing Brief for Appellant were served on the United States Attorney for the District of Columbia on February ____, 1970.

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